

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000765-MR

DEREK TRUMBO

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE AUDRA J. ECKERLE, JUDGE
ACTION NO. 04-CR-001674

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * * * *

BEFORE: LAMBERT AND TAYLOR, JUDGES; HENRY,¹ SENIOR JUDGE.

LAMBERT, JUDGE: Derek Trumbo appeals the Jefferson Circuit Court's denial of his RCr 11.42 motion to vacate his convictions of two counts of first-degree sodomy, two counts of first-degree sexual abuse, and one count of distribution of obscene matter to minors. After careful review, we vacate and remand for an evidentiary hearing.

¹ Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

On June 10, 2004, Trumbo was indicted for the crimes for which he was convicted. The indictment alleged that the acts took place between June 21, 2000, and June 21, 2003, and occurred between Trumbo and his step-daughter, K.M., who was at that time a child less than twelve years of age. Trumbo's case was initially tried before a jury on June 14, 2005, and resulted in a mistrial due to a hung jury.

In support of its case, the Commonwealth presented the testimony of the alleged victim, K.M.; family members of K.M.; individuals from Family Services and the Cabinet for Health and Family Services; a representative from the Louisville public school system; and the lead detective on the case from the Crimes Against Children Unit. The only witness with direct knowledge of the alleged abuse was K.M. No physical evidence was collected from the scene of the alleged crimes, and no medical evidence was presented at trial.

At his first trial, Trumbo's defense was complete innocence. He presented testimony that G.M., the biological father of K.M., had pressured K.M. into making false allegations against Trumbo. Defense witness M.A., a close friend and neighbor of K.M., testified that K.M. told her that her dad wanted her to "say stuff about [Trumbo]." M.A. also testified that K.M. said that her father told her if she said the things he told her to, life would become "happily ever after like before he [Trumbo] came along." Trumbo's defense counsel also presented the testimony of R.A., M.A.'s mother and also a neighbor of K.M. During her direct examination, R.A. testified that K.M. had also told her that her biological father

wanted her to make false allegations against Trumbo. K.M.'s biological father also testified and on cross-examination stated that he would "do whatever it takes to keep those children away from [Trumbo]." As stated above, Trumbo's first trial resulted in a mistrial due to a hung jury.

Trumbo's case was retried eleven months later, and Trumbo was represented by the same defense attorney. At the second trial on May 16, 2006, the Commonwealth presented the same evidence, with the exception of L.T., K.M.'s biological mother, and presented the same theory of the case. The Commonwealth argued that Trumbo abused K.M. when nobody else was around and would keep her home from school to abuse her. The Commonwealth alleged that K.M. did not report the abuse because she feared Trumbo.

At the second trial, Trumbo's defense was again that he was completely innocent and had been falsely accused of the abuse. However, Trumbo's defense counsel did not put on any testimony regarding the allegations that K.M.'s biological father pressured her to make false accusations, as was presented at the first trial. Trumbo's defense counsel did not present the testimony of M.A. or R.A., K.M.'s neighbors, and did not cross-examine K.M.'s biological father regarding his vow to keep his children away from Trumbo. On May 18, 2006, the jury returned a verdict of guilty.

On May 22, 2006, Trumbo opted to plead guilty rather than proceed to the penalty phase of his trial. Trumbo entered a guilty plea to all five convictions in exchange for a recommendation of a total sentence of twenty-five years. During

his plea colloquy, Trumbo indicated that he was satisfied with the advice of his trial defense counsel, wished to plead guilty, and waived his right to an appeal. The trial court sentenced Trumbo in accordance with the plea agreement on July 17, 2006.

On January 4, 2007, Trumbo filed a *pro se* motion to vacate the judgment pursuant to CR 60.02(b)(e) and (f). On June 6, 2007, Trumbo filed a *pro se* RCr 11.42 motion and an accompanying memorandum. On October 26, 2007, Trumbo, through counsel, filed a supplemental memorandum of law and facts in support of his *pro se* RCr 11.42 motion and a motion for an evidentiary hearing. In an opinion and order entered on March 13, 2008, the trial court noted that trial defense counsel had represented Trumbo's interests "with all the skill and tact of a seasoned, well-qualified defense attorney" and denied both Trumbo's RCr 11.42 and CR 60.02 motions without an evidentiary hearing. Trumbo now appeals the trial court's denial of his RCr 11.42 motion. Because we believe Trumbo was entitled to an evidentiary hearing in this case, we vacate and remand for proceedings consistent with this opinion.

On appeal, Trumbo presents two arguments. First, Trumbo argues that he received ineffective assistance of counsel during his second trial based on his attorney's failure to fully prepare for trial and to present testimony of two defense witnesses. Second, Trumbo argues that he received ineffective assistance of counsel when his attorney failed to adequately cross-examine K.M.'s biological father about statements involving his children's safety. Trumbo argues that the

trial court erred in denying his RCr 11.42 motion without holding an evidentiary hearing to determine why his attorney did not present the same evidence at his second trial.

In support of his arguments on appeal, Trumbo argues that at his first trial, his attorney presented the testimony of K.M.'s neighbors, M.A. and her mother, R.A., who both testified that K.M. told them that her father had asked her to lie about Trumbo sexually abusing her in order to keep her away from Trumbo. Trumbo argues that this specific evidence created reasonable doubt as to his guilt in some of the juror's minds and resulted in a hung jury. Trumbo argues that his trial counsel failed to obtain copies of trial transcripts from his first trial and failed to refresh himself on the facts of the case to ensure presentation of Trumbo's best defense. Trumbo contends that as a result of his counsel's failure to prepare, trial counsel did not effectively utilize M.A. and R.A. as defense witnesses in his second trial. Trumbo argues that his counsel's actions prejudiced him because there was a reasonable probability that at least one juror would have struck a different balance in determining guilt or innocence had they heard the testimony presented by the two witnesses.

Trumbo argues that whether or not counsel conducted adequate investigation and preparation cannot be resolved from the face of the record, nor can the record reflect why his counsel failed to call M.A. and R.A. as witnesses during his second trial. Trumbo claims that the trial court therefore erred in

denying him an evidentiary hearing under *Fraser v. Commonwealth*, 59 S.W.3d 448 (Ky. 2001).

Further, Trumbo argues that his trial counsel failed to effectively cross-examine K.M.'s father, who Trumbo claims had motivation to prompt K.M. to make false allegations against him. While testifying at Trumbo's first trial, K.M.'s father testified on cross-examination that he told various people he would "do whatever it takes to keep those children away from [Trumbo]." However, during the second trial, this testimony was not elicited by defense counsel.

Trumbo argues that had this information been presented to the jury, it would have strengthened the credibility of M.A. and R.A. and supported the theory that K.M.'s father had pressured K.M. into making false allegations against Trumbo so that her father could retain custody of K.M. and her brother, L.G. Trumbo argues that had this testimony been elicited at his second trial, there is a reasonable probability that the jury would have found that he was not guilty of the charges, based on the hung jury in his first trial.

The Commonwealth argues that Trumbo received effective assistance of counsel during both trials and that Trumbo was not entitled to an evidentiary hearing on his RCr 11.42 motion because Trumbo's allegations could be easily refuted by the record. The Commonwealth contends that the record reflects that K.M.'s father had already obtained custody of his children as a result of Trumbo's physical abuse of them and that K.M.'s father would have therefore had no reason

to lie or to pressure K.M. into making false allegations in order to obtain custody of his children.

The Commonwealth also argues that Trumbo's defense at his second trial was the same as his defense during the first trial, that K.M.'s allegations were all lies and that he did not know why she would tell such lies. According to the Commonwealth, Trumbo should have spoken up during the second trial had he wanted his counsel to elicit such information during his defense. The Commonwealth argues that the record reflects that Trumbo's defense counsel was prepared and sought out transcripts from the first trial, which were utilized for objections and other purposes. Finally, the Commonwealth argues that K.M.'s father's testimony dispelled the theory that he pressured K.M. to lie in order to gain custody of his children because the testimony reflected that the children had already been placed in his custody prior to the allegations of sexual abuse. However, in the same breath, the Commonwealth argues that Trumbo's defense counsel did not question K.M.'s father and other defense witnesses about the physical abuse and K.M.'s father's pressure on K.M. to lie because counsel did not want to open the door to highlighting Trumbo's history of physical abuse.

On appeal we review the trial court's denial of an RCr 11.42 motion for an abuse of discretion. The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citing 5 Am.Jur.2d Appellate Review § 695 (1995)).

An ineffective assistance of counsel claim is assessed under the *Strickland* two-prong test. As set out in *Bowling v. Commonwealth*, 80 S.W.3d 405 (Ky. 2002):

[t]he *Strickland* standard sets forth a two-prong test for ineffective assistance of counsel: First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984). To show prejudice, the defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is the probability sufficient to undermine the confidence in the outcome. *Id.* at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 695.

Bowling at 411-412.

A movant under RCr 11.42 is only entitled to an evidentiary hearing "if there is a material issue of fact that cannot be conclusively resolved, i.e., conclusively proved or disproved, by an examination of the record." *Fraser v. Commonwealth*, 59 S.W.3d 448, 452 (Ky. 2001). If an evidentiary hearing is required, the defendant is indigent, and the defendant has specifically requested in writing the appointment of counsel, the trial court must appoint counsel. *Fraser* at 453.

In the instant case, both the Commonwealth and the trial court rely on nothing more than mere speculation to surmise why Trumbo's defense counsel did not utilize the testimony of R.A. and her daughter, M.A., or cross-examine K.M.'s father because he did not want to call attention to Trumbo's previous criminal record or history of physical abuse. We do not believe the trial court can conclusively make such a determination from the face of the record. In light of the fact that this testimony *was* presented at the first trial which resulted in a hung jury, it seems reasonable and just to make an evidentiary inquiry as to why this testimony was not presented again at the second trial. Given that there was other evidence on the record of Trumbo's alleged physical abuse of K.M. and her brother, L.G., we can not accept the Commonwealth or the trial court's reasoning to forego an evidentiary hearing in this case on grounds that such defense testimony was not presented because of the risk of making Trumbo look bad in front of the jury.

Given these circumstances, we find that an evidentiary hearing was warranted to set forth more than mere speculation on the record as to Trumbo's counsel's motivations in not introducing the seemingly favorable testimony discussed herein at Trumbo's second trial. Upon review of this testimony, only then do we believe the trial court can make an informed determination as to whether Trumbo's attorney rendered ineffective assistance of counsel under *Strickland*. Accordingly, we reverse and remand with instructions that the

Jefferson Circuit Court conduct an evidentiary hearing on Trumbo's ineffective assistance of counsel claims under RCr 11.42.

TAYLOR, JUDGE, CONCURS.

HENRY, SENIOR JUDGE, DISSENTS AND FILES SEPARATE OPINION.

HENRY, SENIOR JUDGE, DISSENTING: I respectfully dissent. The trial court thoroughly and carefully reviewed Trumbo's post-conviction motion. The motion was properly denied and the trial court's ruling should be affirmed.

As the trial court pointed out at page 10 of its closely-reasoned 13-page Opinion and Order, Trumbo's quarrels are with issues connected with the jury trial. They are therefore largely irrelevant, because Trumbo pleaded guilty. After the jury found him guilty during the guilt phase of the trial, he withdrew his plea of not guilty and entered a guilty plea in exchange for the Commonwealth's recommendation of a sentence of 25 years' imprisonment. Trumbo does not challenge the voluntariness or validity of his guilty plea. It is well established in Kentucky law that a valid guilty plea constitutes a waiver of all defenses except that the indictment charged no offense. *Sanders v. Commonwealth*, 663 S.W.2d 216, 218 (Ky. App. 1983).

When a defendant has entered a plea of guilty, reviewing courts use a standard slightly different from the usual *Strickland* review to determine whether counsel's performance was deficient:

A showing that counsel's assistance was ineffective in enabling a defendant to intelligently weigh his legal alternatives in deciding to plead guilty has two components: (1) that counsel made errors so serious that counsel's performance fell outside the wide range of professionally competent assistance; and (2) that the deficient performance so seriously affected the outcome of the plea process that, but for the errors of counsel, there is a reasonable probability that the defendant would not have pleaded guilty, but would have insisted on going to trial.

Sparks v. Commonwealth, 721 S.W.2d 726, 727-28 (Ky. App. 1986) (citations omitted). Trumbo has not come close to making the showing required by *Sparks* in this case. For one thing it is hard to imagine Trumbo making a convincing showing that he "would have insisted on going to trial" but for his counsel's errors when he has already had not one, but two trials, the second of which finished moments before his plea.

The majority holds that *Fraser v. Commonwealth*, 59 S.W.3d 448 (Ky. 2001), requires a hearing in this case, concluding that the trial court "rel[ie]d on nothing more than mere speculation" to assess why Trumbo's counsel did not call certain witnesses at the second trial. In the first place, a *Fraser* analysis in this case is unnecessary because Trumbo waived the argument when he pleaded guilty. The guilty plea record refutes Trumbo's evidentiary arguments. But even if there were no guilty plea, I must respectfully disagree that it amounts to an abuse of discretion for the trial court to decline to hold an RCr 11.42 hearing when it is clear that sound strategic reasons supported trial counsel's decision regarding which witnesses to call and what evidence to introduce. The trial court was in the best

position to judge such matters. This case does not raise the specter of secret plea agreements and off-the-record shenanigans the *Fraser* court tried to set right. Our Supreme Court has said that “RCr 11.42 motions attempting to denigrate the conscientious efforts of counsel on the basis that someone else would have handled the case differently or better will be accorded short shrift in this court.” *Moore v. Commonwealth*, 983 S.W.2d 479, 485 (Ky. 1998) (citation omitted). Because Trumbo’s allegations of error are clearly refuted by the record of his valid guilty plea and because it is unnecessary to remand this case for a hearing, I respectfully dissent.

BRIEFS FOR APPELLANT:

Melanie Ann Foote
Kathleen K. Schmidt
Department of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General

Susan Roncarti Lenz
Assistant Attorney General
Frankfort, Kentucky